

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

In the Matter of

Virgin Mobile USA, L.P.

Application for Limited Designation as an

Eligible Telecommunications Carrier.

Docket No. 14-0475

**VIRGIN MOBILE USA, L.P.'S**  
**OPENING BRIEF**

January 14, 2015

## **TABLE OF CONTENTS**

|   |    |
|---|----|
| SUMMARY AND INTRODUCTION .....  | 1  |
| SUMMARY OF THE FACTUAL RECORD .....   | 2  |
| I.    Virgin Mobile’s Commitment to Comply With Illinois E911 Requirements<br>Satisfies ETC Application Requirements.....   | 5  |
| II.   The Commission Does Not Have Jurisdiction to Compel Virgin Mobile to Seek A<br>Ruling From the Department of Revenue .....  | 7  |
| III.  The Wireless E911 Surcharge Cannot Be Assessed Upon Virgin Mobile’s No<br>Charge Base Lifeline Plan Customers Under Current Law And It Would Be<br>Discriminatory To Assess It Unless All Lifeline Providers Are Treated Equally..... | 10 |
| A.   Even assuming the Commission has the Authority to Address the E911<br>Surcharge, the PW9SA Wireless E911 Surcharge Cannot Be Assessed<br>Upon Virgin Mobile’s No Charge Base Lifeline Plan Under Current Law ....                      | 12 |
| B.   It Would Be Discriminatory To Impose A Condition Regarding E911 Fees<br>Upon Virgin Mobile While Not Imposing the Condition on Similarly<br>Situated Lifeline providers.....   | 15 |
| CONCLUSION .....  | 17 |

## **TABLE OF AUTHORITIES**

|   | <b>Page(s)</b>    |
|---|-------------------|
| <b>Cases</b>  |                   |
| <i>Ace Ambulance &amp; Oxygen Service Co. v. Ill. Commerce Comm’n.</i> , 75 Ill. App. 3d 17 (1979).....   | 7, 8              |
| <i>Assure Competitive Transp., Inc. v. U.S.</i> , 629 F.2d 467, 477 (7th Cir. 1980).....  | 7                 |
| <i>Federal-State Joint Board on Universal Service</i> , Recommended Decision, CC Docket No. 96-45, 19, FCC Rcd 4257 (rel. Feb. 27, 2004).....   | 6                 |
| <i>In re Cricket Communications, Inc. Application for Designation as an Eligible Telecommunications Carrier</i> , Order, Commission Dkt. No. 10-0453 (rel. Jul. 11, 2012).....  | 7                 |
| <i>In re i-wireless, LLC d/b/a K-Wireless, LLC d/b/a Access Wireless Application for Designation as an Eligible Telecommunications Carrier in the State of Illinois for the Limited Purpose of Offering Lifeline Service to Qualified Households</i> , Order, Commission Dkt. ICC 11-0073 (rel. Apr. 15, 2011)..... | 7, 15             |
| <i>In re Telrite Corporation Application for Designation as an Eligible Telecommunications Carrier in the State of Illinois for the Limited Purpose of Offering Lifeline Service to Qualified Households</i> , Order, Commission Dkt. 10-0512 (rel. May 4, 2011).....   | 7                 |
| <i>Illinois Commerce Commission on its Own Motion</i> , Order, 2012 WL 1901933, Commission Dkt. 12-0355 (rel. May 22, 2012).....  | 10                |
| <i>Illinois Commerce Commission on its Own Motion v. Commonwealth Edison Co.</i> , Order Commission Dkt. 92-0303(rel. Spt. 7, 1994).....  | 7                 |
| <i>In the Matter of Federal-State Joint Board on Universal Service</i> , FCC Dkt. No. 96-45, Report and Order, 20 F.C.C.R. 6371 (rel. Mar. 17, 2005).....   | 5, 6              |
| <i>Ramsey Emergency Services, Inc. v. Illinois Commerce Commission</i> , 367 Ill. App. 3d 351 (1 <sup>st</sup> Dist. 2006).....   | 8                 |
| <b>Statutes</b>   |                   |
| 50 ILCS 750/ <i>et seq.</i> .....   | 9                 |
| 50 ILCS 753/ <i>et seq.</i> .....   | passim            |
| 50 ILCS 753/ <i>et seq.</i> .....   | 8, 11, 12, 13, 14 |

|                                   |   |
|-----------------------------------|---|
| 83 Ill. Adm. Section 736.500..... | 6 |
|-----------------------------------|---|

#### **Other Authorities**

|  |   |
|--|---|
| 2 Am. Jur. 2d Administrative Law § 354 ..... | 7 |
|--|---|

|   |   |
|---|---|
| <a href="http://tax.illinois.gov/TaxRates/Other.htm">http://tax.illinois.gov/TaxRates/Other.htm</a> ..... | 8 |
|---|---|

|   |   |
|---|---|
| <a href="http://www.merriam-webster.com/dictionary/purchase">http://www.merriam-webster.com/dictionary/purchase</a> ..... | 9 |
|---|---|

## **SUMMARY AND INTRODUCTION**

The Illinois Commerce Commission (“Commission”) should grant the petition of Virgin Mobile USA, L.P. (“Virgin Mobile”) for limited designation as a wireless eligible telecommunications carrier (“ETC”) in the state of Illinois.<sup>1</sup> As explained in its Petition and throughout the course of this proceeding, Virgin Mobile meets all federal and state statutory and regulatory requirements to be designated as an Illinois ETC provider. Furthermore, the Staff of the Illinois Commerce Commission (“Staff”) recommends designation of Virgin Mobile as a wireless ETC subject to thirteen conditions.<sup>2</sup> Virgin Mobile agrees to and accepts twelve of Staff’s proposed conditions.<sup>3</sup>

With respect to the sole remaining issue in this proceeding, the Commission should not adopt Staff’s proposed condition. Staff’s proposed condition (Condition No. 4)<sup>4</sup> requires that Virgin Mobile seek an advisory ruling from the Illinois Department of Revenue (“DOR”) on the applicability of the Prepaid Wireless 9-1-1 Surcharge Act (attached as Exhibit 1, “PW9SA”) to federal subsidies provided through the federal Lifeline Assistance program (“Lifeline”). As demonstrated below, this proposed condition is not required for Virgin Mobile to satisfy its ETC application requirement, would exceed the scope of the Commission’s authority, would result in discretionary treatment of Virgin Mobile and, in any case, would be futile because the PW9SA surcharge does not apply to Lifeline subsidies by the statute’s own terms.

---

<sup>1</sup> Petition of Virgin Mobile USA, L.P. for Limited Designation as a Wireless Eligible Telecommunications Carrier, Commission Dkt. 14-0475, dated Jul. 23, 2014 (“Petition”).

<sup>2</sup> Direct Testimony of Dr. James Zolnierrek, Policy Division Illinois Commerce Commission, Commission Dkt. 14-0475, Staff Exhibit 1.0, 36:774-38:826.

<sup>3</sup> Rebuttal Testimony of James R. Burt, Director-Policy Virgin Mobile USA, L.P., Commission Dkt. 14-0475, dated Nov. 12, 2014, Virgin Mobile Exhibit 2.0, 6:13-7:2.

<sup>4</sup> Staff Exhibit 1.0, 37:783-791.

## **SUMMARY OF THE FACTUAL RECORD**

Virgin Mobile submitted its Petition in this matter seeking to be designated as an ETC in the state of Illinois solely for the purpose of receiving federal universal service Lifeline support.<sup>5</sup> Virgin Mobile is a wholly owned subsidiary of Sprint Corporation (“Sprint”), and provides Sprint’s prepaid wireless services on a common carrier basis.<sup>6</sup> By Commission Order, dated February 16, 2012, Virgin Mobile is authorized to provide competitive prepaid wireless telecommunications services in Illinois.<sup>7</sup>

Virgin Mobile first began providing telecommunications service in July 2002 and is currently authorized to provide competitive telecommunications services to consumers in every state in the nation, and in Washington, D.C. and Puerto Rico.<sup>8</sup> Virgin Mobile has widely-deployed its Lifeline services, through its “Assurance Wireless Brought To You By Virgin Mobile” brand.<sup>9</sup> Currently, Virgin Mobile is designated as a wireless ETC provider in 41 jurisdictions, and provides Lifeline services in each of these jurisdictions.<sup>10</sup> Virgin Mobile will offer all of the services supported by the Lifeline program to eligible consumers throughout Virgin Mobile’s designated service area in Illinois following ETC designation.<sup>11</sup>

On September 16, 2014, Virgin Mobile submitted the Direct Testimony of James R. Burt, Director – Policy, in which Mr. Burt testified that Virgin Mobile satisfies each of the federal statutory requirements and regulations for designation as an ETC in Illinois and explained that

---

<sup>5</sup> Petition, 1-2.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *See In re Application for a certificate of wireless authority to operate as a facilities based carrier of telecommunications services in the State of Illinois*, Final Order, Commission Dkt. No. 12-0027 (rel. Feb. 16, 2012); *see also* Petition, 3.

<sup>8</sup> Petition, 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

designation of Virgin Mobile is in the public interest.<sup>12</sup> Mr. Burt also explained that Virgin Mobile is committed to compliance with Commission rules governing wireless ETCs<sup>13</sup> and confirmed that “Virgin Mobile commits to providing its subscribers access to 911 and E911 services in all county and municipal jurisdictions in its proposed services area that have 911 and E911 functionality ... [and] commits to paying all applicable E-911 fees in a timely manner.”<sup>14</sup>

In response, Dr. Zolnierek, on behalf of Staff, recommended that the Commission should approve Virgin Mobile’s application and designate the Company as a wireless ETC subject to thirteen conditions.<sup>15</sup> Included in these proposed conditions, the Staff recommended that, as condition of Virgin Mobile’s ETC designation:

Virgin Mobile should, within 30 days of designation, request guidance/clarification from the Illinois Department of Revenue regarding whether it is required to remit surcharges pursuant to PW9SA with respect to its Lifeline customers subscribing to Virgin Mobile’s primary Lifeline service package. Virgin Mobile should report any guidance/clarification received in response to this request, within this docket, within 5 days of receipt of such guidance/clarification. Virgin Mobile should comply with any such guidance/clarification.<sup>16</sup>

Virgin Mobile subsequently agreed to and accepted twelve of Staff’s proposed conditions.<sup>17</sup> However, Virgin Mobile is unable to agree to Staff’s proposed Condition No. 4. As Mr. Burt notes on behalf of Virgin Mobile:

Virgin Mobile is committed to paying applicable fees on a non-discriminatory basis ... [and] Virgin Mobile will agree to pay E911 fees on its base Lifeline offering (free offer) if the Illinois Department of Revenue determines that E911

---

<sup>12</sup> Direct Testimony of James R. Burt, Director-Policy Virgin Mobile USA, L.P., Commission Dkt. 14-0475, dated Sept. 16, 2014, Virgin Mobile Ex. 1.0, 6-24.

<sup>13</sup> *Id.* at 24-25.

<sup>14</sup> Virgin Mobile Exhibit 1.0, 13:266-14:272.

<sup>15</sup> Staff Exhibit 1.0, 36:774-38:826.

<sup>16</sup> Staff Exhibit 1.0, 37:783-791 (Condition No. 4).

<sup>17</sup> Virgin Mobile Exhibit 2.0, 6:13-7:2. In addition, Virgin Mobile Exhibit 2.0 updated Virgin Mobile’s proposed ETC service area designation and modified the Petition’s waiver requests in light of Commission rule revisions.

fees are applicable on the base Lifeline offering and such ruling is affirmed by a reviewing court or agency such that the determination would apply equally to all similarly situated carriers. If such a ruling is made, Virgin Mobile will inform the Commission and begin remitting the fee.<sup>18</sup>

As Rebuttal, Staff continues to insist on the Commission's application of Condition No. 4 as a condition of Virgin Mobile's ETC designation in Illinois.<sup>19</sup> However, Staff notes that "the DOR administers the collection of 9-1-1 surcharges and is afforded the ability to implement and enforce the PW9SA. Regardless of my opinion, it is the DOR's interpretation of the PW9SA that is relevant ..."<sup>20</sup>

### **ARGUMENT**

The only contested issue in this matter is whether the Commission has the authority to, and should, impose Condition No. 4 on Virgin Mobile's ETC designation.<sup>21</sup> Staff has recommended that the Commission approve Virgin Mobile's application and designate the Company as a wireless ETC subject to twelve additional conditions, and Virgin Mobile has agreed to and accepted Staff's twelve other proposed conditions.<sup>22</sup>

The Commission should not impose Staff's proposed Condition No. 4 for at least three reasons. First, Virgin Mobile's commitment to comply with Illinois E911 regulations is sufficient to satisfy Virgin Mobile's ETC designation application requirements. Second, Staff's proposed condition is beyond the jurisdiction and authority of the Commission. The Commission has no authority to compel an ETC applicant to seek an advisory ruling from the Illinois DOR. Third, an

---

<sup>18</sup> *Id.* at 5:3-16.

<sup>19</sup> Rebuttal Testimony of Dr. James Zolnierrek, Policy Division Illinois Commerce Commission, Commission Dkt. 14-0475, dated Dec. 3, 2014, Staff Exhibit 2.0, 7:141-8:176.

<sup>20</sup> *Id.* at 7:142-149.

<sup>21</sup> Transcript of the Evidentiary Hearing held on Dec. 17, 2014, Commission Dkt. 14-0475 ("Tr."), 23:4-6.

<sup>22</sup> Staff Exhibit 1.0, 36:774-38:826; Virgin Mobile Exhibit 2.0, 6:13-7:2.



advisory ruling from the DOR is not required because the provisions of the PW9SA are clear and unambiguous. The PW9SA E911<sup>23</sup> surcharges do not apply to non-billed Lifeline service packages where no money is collected from the consumer. Consequently, there is no need to impose Staff's proposed condition as a condition of Virgin Mobile's ETC designation.

Virgin Mobile satisfies each of the federal and state statutory and regulatory requirements to be designated as an ETC in the state of Illinois and has agreed to twelve of Staff's proposed conditions. The Commission should therefore designate Virgin Mobile as a wireless ETC provider in Illinois, but should not impose Staff Condition No. 4 as part of that designation.

**I. Virgin Mobile's Commitment to Comply With Illinois E911 Requirements Satisfies ETC Application Requirements**

Virgin Mobile has repeatedly stated its commitment to comply with its E911 duties and remit applicable 911 surcharges.<sup>24</sup> Under existing Commission practice and the FCC's *ETC Designation Order*, a stated commitment is sufficient to satisfy an ETC applicants' burden of proof to demonstrate that it meets the minimum FCC and Commission requirements to be designated as an ETC in Illinois.<sup>25</sup>

Both the Commission rules and FCC decisions make clear that an ETC applicant is merely required *to commit* to providing services throughout its proposed ETC designated service area.<sup>26</sup> This is a nuanced but important distinction. The *ETC Designation Order* could not be more clear on this point: "we require an ETC applicant *make specific commitments* to provide service to requesting customers in the service areas for which it is designated as an ETC" to

---

<sup>23</sup> 911 and 9-1-1 are used interchangeably in this Brief.

<sup>24</sup> Virgin Mobile Exhibit 1.0, 13:266-14:272; Virgin Mobile 2.0, 5:3-16.

<sup>25</sup> *In the Matter of Federal-State Joint Board on Universal Service*, FCC Dkt. No. 96-45, Report and Order, 20 F.C.C.R. 6371 (rel. Mar. 17, 2005) ("*ETC Designation Order*").

<sup>26</sup> Access to emergency services is a support service pursuant to 47 C.F.R. § 54.101 and 47 C.F.R. §54.401(a)(2).

satisfy Section 214(e)(1).<sup>27</sup> As a further example, the FCC makes clear that only a commitment to provide supported services is required when it states that “We adopt the requirement that an ETC applicant must demonstrate its commitment and ability to provide supported services throughout the designated service area” by among other things, “submitting a formal network improvement plan that demonstrates how universal service funds will be used to improve coverage, signal strength, or capacity that would not otherwise occur ... We encourage states to follow the Joint Board’s proposal that any build-out commitments adopted by states ‘be harmonized with any existing policies regarding line extensions and carrier of last resort obligations’.”<sup>28</sup> Similarly, the Commission rules also only require a commitment to provide service rather than an evidentiary demonstration. For example, Section 736.500 of the Commission’s rules, 83 Ill. Adm. Section 736.500 (Adequacy of Service), merely requires a commitment to comply with the service quality and consumer protection provisions in the Cellular Telecommunications and Internet Association’s (CTIA) Consumer Code for Wireless Service to ensure adequate service quality.

Under existing Commission practice and the FCC’s *ETC Designation Order*, Virgin Mobile’s stated commitment to pay all applicable E911 fees in a timely manner is sufficient to satisfy Virgin Mobile’s ETC designation burden. Staff’s insistence on an additional showing by way of confirmation from the Illinois DOR exceeds existing Commission practice and the FCC’s *ETC Designation Order*.

---

<sup>27</sup> *ETC Designation Order*, ¶ 22 (emphasis added).

<sup>28</sup> *ETC Designation Order*, ¶ 21, citing *Federal-State Joint Board on Universal Service*, Recommended Decision, CC Docket No. 96-45, 19, FCC Rcd 4257, 4258-4260, ¶¶1-4 (rel. Feb. 27, 2004)

In addition, Staff has the burden to demonstrate cause to deviate from existing Commission practice.<sup>29</sup> As demonstrated by existing ETC designation orders, the Commission does not require confirmation of future compliance with the PW9SA requirements following ETC designation.<sup>30</sup> Accordingly, Staff has the burden to demonstrate why the Commission should depart from its existing practice. However, the record is devoid of information calling into question Virgin Mobile's commitment to pay all applicable 911 surcharges. Forcing Virgin Mobile to initiate a proceeding with the DOR to demonstrate compliance with the Commission's ETC rules is unprecedented, and not required under existing Commission's rules. Staff presents no justifiable rationale for deviating from existing Commission practice for Virgin Mobile's ETC Petition. The Commission should therefore decline to adopt Staff's proposed Condition No. 4.

## **II. The Commission Does Not Have Jurisdiction to Compel Virgin Mobile to Seek A Ruling From the Department of Revenue**

The Commission does not have authority to compel Virgin Mobile to seek a post-designation advisory ruling from a separate Illinois agency as a condition of its ETC designation. The Commission derives its power and authority from the statute creating it, and may not, by its own acts, extend its jurisdiction. *Ace Ambulance & Oxygen Service Co. v. Ill. Commerce*

---

<sup>29</sup> See, e.g., 2 Am. Jur. 2d Administrative Law § 354 ("Under both federal and state administrative procedure acts, unless otherwise provided by statute, the proponent of a rule or order has the burden of proof"); *Assure Competitive Transp., Inc. v. U.S.*, 629 F.2d 467, 477 (7th Cir. 1980) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof"); *Illinois Commerce Commission on its Own Motion v. Commonwealth Edison Co.*, Commission Dkt. 92-0303, Order (rel. Spt. 7, 1994) (Commissioner Williams, dissenting) ("those who seek to change long-standing Commission regulation also must carry the burden of justifying the requested change....").

<sup>30</sup> See, e.g., *In re i-wireless, LLC d/b/a K-Wireless, LLC d/b/a Access Wireless Application for Designation as an Eligible Telecommunications Carrier in the State of Illinois for the Limited Purpose of Offering Lifeline Service to Qualified Households*, Order, Commission Dkt. ICC 11-0073 (rel. Apr. 15, 2011); *In re Cricket Communications, Inc. Application for Designation as an Eligible Telecommunications Carrier*, Order, Commission Dkt. No. 10-0453 (rel. Jul. 11, 2012); see also *In re Telrite Corporation Application for Designation as an Eligible Telecommunications Carrier in the State of Illinois for the Limited Purpose of Offering Lifeline Service to Qualified Households*, Order, Commission Dkt. 10-0512 (rel. May 4, 2011) (ETC Designation Order does not specifically require confirmation of future compliance with current E911 statute).

*Comm’n.*, 75 Ill. App. 3d 17, 19 (3d Dist. 1979); *Ramsey Emergency Services, Inc. v. Illinois Commerce Commission*, 367 Ill. App. 3d 351, 357 (1<sup>st</sup> Dist. 2006) (finding that a reviewing court will set aside a Commission decision where the Commission acts outside the scope of its authority). And, while it is true that the Commission possesses broad authority to adopt rules to monitor and regulate public utilities, including telecommunications providers, there is no statute or regulation which permits the Commission to order an ETC applicant to initiate a separate legal proceeding with the Illinois DOR to resolve Staff’s question concerning the applicability of the PW9SA to Lifeline federal subsidies.

The PW9SA makes clear that the Commission has no authority to interpret or administer carriers’ remittance of surcharges under the PW9SA. For example, in recently establishing PW9SA,<sup>31</sup> the Illinois General Assembly placed the administration of E911 surcharges, including the authority to establish necessary rules, with the DOR, not the Commission. The PW9SA states that the “Department shall administer the collection of all 9-1-1 surcharges and may adopt and enforce reasonable rules relating to the administration and enforcement of the provisions of this Act as may be deemed expedient.”<sup>32</sup> The Illinois legislature specifically charged DOR – not the Commission – with the responsibility to collect the surcharge and to monitor compliance by the industry.

Staff’s testimony admits that Commission has no jurisdiction over the interpretation or administration of the PW9SA. When asked on rebuttal, Dr. Zolnierек acknowledges “the DOR administers the collection of 9-1-1 surcharges and is afforded the ability to implement and enforce the PW9SA”<sup>33</sup> and that, notwithstanding his view, “it is the DOR’s interpretation of the

---

<sup>31</sup> The PW9SA became effective on January 1, 2012. Public Act 97-463, 50 ILCS 753/1 *et seq.*

<sup>32</sup> 50 ILCS 753/20(d).

<sup>33</sup> Staff Exhibit 2.0, 7:146-149.

PW9SA that is relevant” to addressing whether or not federal subsidies are subject to collection under the PW9SA.<sup>34</sup> Nevertheless, Staff continues to insist that Virgin Mobile must resolve by proxy whether every prepaid wireless ETC designee in Illinois must remit surcharges on federal subsidies.<sup>35</sup> Staff’s continued insistence on Condition No. 4 as part of Virgin Mobile’s ETC designation can only be described as a demand for an advisory opinion to resolve Staff’s curiosity as to the applicability of the PW9SA to all Lifeline providers that offer a federally subsidized free service plan. There is no justifiable basis for using Virgin Mobile as a vehicle to resolve Staff’s open question concerning the applicability of the statute in a scenario that extends to other carriers, including those previously designated.

Furthermore, the Commission already has information in its possession that answers the question Staff raises and has a right to receive information from the Illinois DOR. Staff states that “I do not know whether there are other Lifeline providers that do not remit E9-1-1 surcharges to DOR” under the PW9SA.<sup>36</sup> Yet, since 2012, the Commission has received reports from the Illinois DOR reporting carrier remittances under the PW9SA and the Wireless Emergency Telephone Safety Act (50 ILCS 751) and has a right to request information about remittances under these statutes pursuant to an interagency agreement.<sup>37</sup> Specifically, the Commission receives the amount of carrier remittances, and the number and general location of wireless subscribers for each carrier.<sup>38</sup> If Staff would like additional information Lifeline plan remittances, it should examine information already in its possession or inquire directly to the

---

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 8:170-176.

<sup>36</sup> *Id.* at 7:158-161.

<sup>37</sup> *Illinois Commerce Commission On Its Own Motion*, Order, 2012 WL 1901933, Commission Dkt. 12-0355, dated May 22, 2012.

<sup>38</sup> *Id.*

DOR to get additional information rather than using Virgin Mobile as a vehicle to get information from the DOR.

Staff presents no valid justification to condition Virgin Mobile's ETC designation on a post-designation request for an advisory opinion from a separate Illinois agency. Furthermore, Staff is unable to point to any statute or regulation that permits the Commission to order an ETC applicant to initiate a separate legal proceeding as a condition to its ETC designation. The Commission should therefore decline to impose Staff's Condition No. 4 as part of Virgin Mobile's ETC designation.

### **III. The Wireless E911 Surcharge Cannot Be Assessed Upon Virgin Mobile's No Charge Base Lifeline Plan Customers Under Current Law And It Would Be Discriminatory To Assess It Unless All Lifeline Providers Are Treated Equally**

As explained in its application and the testimony of James Burt, Virgin Mobile commits to providing its subscribers access to 911 and E911 services in all county and municipal jurisdictions in its proposed service area that have 911 and E911 functionality.<sup>39</sup> Moreover, Virgin Mobile commits to remitting all applicable E911 fees in a timely manner.<sup>40</sup> In fact, in certain states as required by law, Virgin Mobile remits E911 fees if its Lifeline customers buy additional wireless services from Virgin Mobile in addition to the no charge Lifeline offering.<sup>41</sup> The dispute in the instant proceeding is not whether Virgin Mobile should provide access to 911 or E911 or whether Virgin Mobile must remit E911 fees for its wireless prepaid customers. The sole dispute is whether Virgin Mobile is required to remit E911 surcharges on money collected

---

<sup>39</sup> Virgin Mobile Exhibit 1.0, 13:262-14:279.

<sup>40</sup> *Id.*

<sup>41</sup> Virgin Mobile Ex. 2.0, 4:2-21; Virgin Mobile Response to Staff's First Set of Data Requests, JZ 1.06.

from the Universal Service Fund for its free Lifeline service offering which is paid for solely by federal subsidies.<sup>42</sup>

As discussed, Staff witness Dr. Zolnierrek recommends, and Commission Staff made as a condition of grant to the Company's ETC application, that Virgin Mobile request guidance/clarification from the Illinois DOR within 30 days of designation as to whether Virgin Mobile is required to remit surcharges pursuant to the PW9SA<sup>43</sup> on its no charge Lifeline services.<sup>44</sup> The current fee is 9% per retail transaction for transactions in Chicago and 1.5% per retail transaction in non-Chicago locations.<sup>45</sup>

The imposition of the E911 surcharge upon subscribers of the Company's no charge base Lifeline offering who do not purchase additional services from Virgin Mobile is: 1) not required under current Illinois law; and 2) is discriminatory because it would impose an obligation on Virgin Mobile Lifeline customers that is not imposed on the Company's Lifeline service competitors. The condition proposed by Commission Staff would have the effect of treating Virgin Mobile and its Lifeline customers different than other Lifeline providers in Illinois, and it would be unfair and discriminatory for Virgin Mobile to be obligated to remit fees if its competitors in the Lifeline market in Illinois do not do so.

---

<sup>42</sup> Virgin Mobile's free or no charge service offering is 250 anytime prepaid minutes per month and unlimited text messages at no charge to the end user. Virgin Mobile currently has a limited time offer of an additional 250 anytime minutes free for the first four months of service. Virgin Mobile Ex. 1.0, pp. 19-20 and fn. 17.

<sup>43</sup> 50 ILCS 753.

<sup>44</sup> Staff Ex. 1.0, 35:736-748; Staff Ex. 2.0, 8:170-176.

<sup>45</sup> 50 ILCS 753/15(a) and (a-5); *see also* <http://tax.illinois.gov/TaxRates/Other.htm> (accessed on 1/12/15).

**A. Even assuming the Commission has the Authority to Address the E911 Surcharge, the PW9SA Wireless E911 Surcharge Cannot Be Assessed Upon Virgin Mobile's No Charge Base Lifeline Plan Under Current Law**

Even if Virgin Mobile were to concede that the Commission has the authority to address the applicability of the E911 surcharge, the plain language of the PW9SA exempts the imposition of the E911 fee upon providers of no-charge or free Lifeline service.

Customers that sign up for and receive Lifeline services under the base plan from Virgin Mobile and pay nothing for their handset or services on a monthly basis are not engaging in a “retail transaction” subject to the E911 fee under the PW9SA. Because there is no charge for Virgin Mobile’s basic Lifeline service offering, there is no qualifying retail transaction on which to impose a surcharges. The PW9SA statute imposes “on consumers a prepaid wireless 9-1-1 surcharge of 1.5% per retail transaction”<sup>46</sup> and Chicago “may impose a prepaid wireless 9-1-1 surcharge not to exceed 9% per retail transaction.”<sup>47</sup> A retail transaction “means *the purchase* of prepaid wireless telecommunications service from a seller for any purpose other than resale.”<sup>48</sup> When receiving service at no charge from Virgin Mobile, a customer makes no “purchase” of prepaid wireless telecommunications services. Purchase is defined as “to buy (property, goods, etc.); to get (something) by paying money for it.”<sup>49</sup> Since there is nothing bought and no money paid by the consumer for the no charge base Lifeline plan, there is no purchase, and no retail transaction takes place as defined in the statute. Without a retail transaction involving a purchase, no fee may be imposed under 50 ILCS 753/15(a) and 753/15(a-5).

---

<sup>46</sup> 50 ILCS § 753/15(a).

<sup>47</sup> 50 ILCS § 753/15(a-5).

<sup>48</sup> 50 ILCS 753/10 (emphasis added).

<sup>49</sup> <http://www.merriam-webster.com/dictionary/purchase>



Further, the definition of “Consumer” in the PW9SA also compels the conclusion that no wireless 911 surcharge is due on the no-charge base Lifeline plan. The fee is “imposed on consumers” under 50 ILCS 753/15(a) and (a-5) only and does not apply if there is no Consumer as the term is defined in PW9SA. The statute states that a “‘Consumer’ means a person *who purchases* a prepaid wireless telecommunications service in a retail transaction.”<sup>50</sup> The definition contemplates the occurrence of a purchase by a person and a retail transaction. In the instance of the no charge base Lifeline plan, there is no “Consumer” to impose the fee upon as there is no purchase and no qualifying retail transaction.

In addition to there being no Consumer, there is similarly no Seller as defined by the Act. Like the definition of “Consumer,” the definition of “Seller” in the PW9SA compels the conclusion that no wireless 911 surcharge is due on the no charge basic Lifeline service offering. Pursuant to the statute, “‘Seller’ means a person who sells prepaid wireless telecommunications service to another person.”<sup>51</sup> The statute declares that the “seller” will collect the surcharge from the “consumer” with respect to “retail transactions” in the state and in Chicago.<sup>52</sup> If there is no selling of prepaid wireless telecommunications service to a consumer by a “seller”, then the collection of the fee by the seller cannot occur.

Next, under the law, the fee is imposed upon the “consumer” and not the “provider” of the prepaid wireless telecommunications service. The “seller” is only liable to remit the surcharges collected from “consumers.” The law states, “The prepaid wireless 9-1-1 surcharge is imposed on the consumer and not on any provider. The seller shall be liable to remit all prepaid

---

<sup>50</sup> 50 ILCS 753/10.

<sup>51</sup> *Id.*

<sup>52</sup> 50 Ill. Comp. Stat. § 753/15(b) and (b-5).

wireless 9-1-1 surcharges that the seller collects from consumers as provided in Section 20 ...”<sup>53</sup>

With respect to its no-charge base Lifeline service offering, Virgin Mobile does not collect any 911 surcharges as its customers do not pay a fee for the service and do not get billed for the service. A requirement that Virgin Mobile remit the fee on its no-charge Lifeline service would violate the statute’s requirement that the fee be imposed on the consumer and not on the provider.

Finally, there are circumstances where the legislature has required no remittances under the PW9SA. For example, Section 15(f) of the PW9SA contemplates the situation where a provider does not remit E911 fees on *de minimis* amounts of service and gives the seller the option to not apply the E911 fees to such a transaction. It states, “[h]owever, if a minimal amount of prepaid wireless telecommunications service is sold with a prepaid wireless device for a single, non-itemized price, then the seller may elect not to apply the percentage specified in subsection (a) or (a-5) of this Section 15 to such transaction. For purposes of this subsection, an amount of service denominated as 10 minutes or less or \$5 or less is considered minimal.”<sup>54</sup> In the case of the free of charge Lifeline plan provided by Virgin Mobile to its customers where the Company provides a handset, even if it is determined in the no charge situation that a “retail transaction” takes place and the definitions of “seller” and “consumer” are met, Virgin Mobile has the option to not assess the fee if the amount of service involved is less than \$5. The free of charge basic Lifeline offering is obviously less than the \$5 threshold, and Virgin Mobile under the PW9SA can elect to not remit the fee.

In sum, the plain language and application of the PW9SA points to not imposing the E911 fee where no qualifying retail transaction takes place and the seller does not collect the fee

---

<sup>53</sup> 50 ILCS 753/15(c).

<sup>54</sup> 50 ILCS 753/15(f).

from the consumer. Additionally, the statute provides that the fee is imposed on the consumer and not the provider. While the provider must remit all fees that it collects from consumers, it cannot make remittances where there is no collection of the E911 fees when there is no purchase made by the consumer. Finally, the PW9SA contemplates non-remittance by providers in certain circumstances where the amount of the retail transaction does not meet a minimum threshold. Therefore, the Commission should not impose a condition related to Virgin Mobile paying E911 fees under the PW9SA.

**B. It Would Be Discriminatory To Impose A Condition Regarding E911 Fees Upon Virgin Mobile While Not Imposing the Condition on Similarly Situated Lifeline providers**

Virgin Mobile is committed to paying applicable E911 fees on a non-discriminatory basis. The condition proposed by Staff for Virgin Mobile's ETC application would have the effect of treating Virgin Mobile differently than other Lifeline providers in Illinois because it would force Virgin Mobile to expend private resources to initiate a proceeding at the DOR and potentially require Virgin Mobile to pay a E911 fee that is not remitted by its Lifeline competitors.

The Commission's recent ETC designation orders granting wireless ETC designations do not include a determination by the Commission that Lifeline providers are required to remit E911 surcharges for no charge Lifeline service offerings.<sup>55</sup> Staff testimony only identified a single provider of Lifeline Service that has committed to remit E911 surcharges on its prepaid wireless base Lifeline offerings.<sup>56</sup> In that instance, the company, American Broadband and Telecommunications Company, voluntarily stipulated that the company would remit applicable

---

<sup>55</sup> See, e.g., *In re i-wireless, LLC d/b/a K-Wireless, LLC d/b/a Access Wireless Application for Designation as an Eligible Telecommunications Carrier in the State of Illinois for the Limited Purpose of Offering Lifeline Service to Qualified Households*, Order, Commission Dkt. 11-0073 (rel. Apr. 15, 2011).

<sup>56</sup> Staff Ex. 2.0, 8:164-166.

E911 surcharges in order to receive its designation as an ETC.<sup>57</sup> Since the PW9SA was enacted in 2012, the Commission has not made a determination that the E911 surcharge applies to Lifeline services. The Commission's requirement that Virgin Mobile affirmatively seek guidance from the DOR is an unprecedented condition on an applicant for designation as a wireless ETC and would force Virgin Mobile to expend substantial resources to initiate and litigate. It is apparent through the evidence in this proceeding that the Commission Staff is uncertain as to whether PW9SA surcharges should apply to Lifeline services. As a result, the Commission Staff is attempting to induce Virgin Mobile into bearing the cost, both in time and resources, to resolve the Commission's questions by withholding the Company's ETC designation.

Because there is no retail transaction and no collection from the consumer for Virgin Mobile's no charge base Lifeline plan, then Virgin Mobile would have to remit E911 fees from the federal reimbursement amount. In other words, Virgin Mobile would have to pay the fees itself rather than collecting the fees from its subscribers. If Virgin Mobile is required to pay the 9% fee in Chicago on no charge customers, it would be liable to pay \$.8325 a month per customer in Chicago based on the federal \$9.25 reimbursement amount. The fee would be \$.13875 a month for customers outside of Chicago. Both amounts would present Virgin Mobile a significant disadvantage in the Illinois Lifeline market vis a vis the multiple other providers in Illinois that currently do not pay the fees on their no charge Lifeline customers. Imposition of the E911 fee upon Virgin Mobile in this proceeding would have a discriminatory impact that must be avoided.

---

<sup>57</sup> See American Broadband and Telecommunications Company, Agreed Joint Stipulation of the Staff of the ICC and Petitioner, Commission Dkt. No. 12-0680, dated Oct. 22, 2013.

## **CONCLUSION**

For the foregoing reasons, the Commission should decline to require that Virgin Mobile seek guidance from the DOR regarding the applicability of E911 surcharges under the PW9SA and designate Virgin Mobile as a wireless ETC provider in Illinois subject to the twelve other conditions proposed by Staff.

January 14, 2015

Respectfully submitted,

VIRGIN MOBILE USA, L.P.

/s/ Henry T. Kelly

Henry T. Kelly  
Michael R. Dover  
Kelley Drye & Warren, LLP  
333 West Wacker Drive, 26<sup>th</sup> Floor  
Chicago, Illinois 60606  
[HKelly@kelleydrye.com](mailto:HKelly@kelleydrye.com)  
[MDover@kelleydrye.com](mailto:MDover@kelleydrye.com)  
Tel.: (312) 857-7070  
Fax: (312) 857-7095

Ken Schiffman  
6450 Sprint Parkway  
Overland Park, KS 66251  
[Kenneth.schiffman@sprint.com](mailto:Kenneth.schiffman@sprint.com)  
Tel.: (913) 315-9873

Elaine Divelbliss  
Virgin Mobile USA, L.P.  
10 Independence Blvd.  
Warren, New Jersey 07059  
[Elaine.divelbliss@sprint.com](mailto:Elaine.divelbliss@sprint.com)  
Tel.: (908) 660-0358

*Counsel to Virgin Mobile USA, L.P.*